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IN THE

Supreme Court of the United States

TEXACO, INC.,
Petitioner,

v.

FOUAD N. DAGHER, ET AL.,
Respondents.

SHELL OIL CO.,
Petitioner,

v.

FOUAD N. DAGHER, ET AL.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of the petitioners. Petitioners have consented to the filing of this brief; their letters of consent have been filed with the Clerk of the Court. Counsel for respondents declined to give consent, thereby necessitating this motion.

WLF is a public interest law and public policy center based in Washington, D.C., with supporters nationwide. Although it participates in litigation and regulatory proceed-

ings in a variety of areas, WLF devotes a substantial portion of its resources to the defense of free enterprise, individual rights, and a limited and accountable government. To advance these ends, WLF has appeared as *amicus* in several antitrust cases before this Court and other federal courts. *See, e.g.*, *Verizon Commc'ns, Inc.* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004); *United States Tobacco Co.* v. *Conwood Co.*, *cert. denied*, 537 U.S. 1148 (2003); *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764 (1993); *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003). WLF also filed a brief as *amicus curiae* in support of the petitions for certiorari in the present cases.

WLF is concerned that by establishing per se antitrust liability for the normal and legitimate business decisions of joint ventures, the judgment of the court of appeals, if not reversed by this Court, will chill the formation of joint ventures that are an increasingly important source of economic growth and innovation. WLF has no interest, financial or otherwise, in the outcome of this lawsuit.

In light of its interests and experience, WLF respectfully moves that the Court grant leave for WLF to submit this brief *amicus curiae*, urging this Court to reverse the judgment of the Ninth Circuit.

Respectfully submitted.

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Amicus Curiae Washington Legal Foundation (WLF) respectfully submits this brief in support of the petitioners.

INTEREST OF *AMICUS CURIAE*[1]

WLF is a public interest law and public policy center based in Washington, D.C., with supporters nationwide. The interests of *amicus* are set out in the motion for leave to file this brief.

STATEMENT

This case presents an opportunity to clarify issues of antitrust law of substantial importance to the formation of joint ventures that contribute to innovation and economic growth in many sectors of the global economy.

1. The joint venture is an increasingly common form of business organization, because it offers "significant transactional advantages" and "allow[s] substantial efficiencies of integration to be achieved." Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 74 Geo. L.J. 1605, 1606-1607 (1986); *see* Chang et al., *Some Economic Principles For Guiding Antitrust Policy Towards Joint Ventures*, Colum. Bus. L. Rev. 223, 228-229 (1998). Joint ventures can create additional productive capacity, facilitate research and development, generate efficiencies through economies of scale and scope, achieve synergies through the pooling of complementary assets and skills, minimize waste through the elimination of duplicative operations, and diversify risk. *See id.* at 237-238; Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701, 702 (1998). Joint ventures—especially cross-border collaborations—in industries as diverse as pharmaceuticals, energy, information technology, and manufacturing play an increasingly important role in facilitating global integration and economic growth. *See* Chang et al., *supra*, at 233-236.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief either in whole or in part, and that no person or entity, other than *amicus* and its counsel, contributed monetarily to either the preparation or the submission of this brief.

2. The joint ventures—Equilon Enterprises and Motiva Enterprises—formed by petitioners exemplify the type of welfare-enhancing, "fully integrated" joint venture that antitrust policy should embrace, not punish. "A joint venture is fully integrated when it encompasses all aspects of a line of business, including manufacturing, distribution, marketing, and sales." ABA Section of Antitrust Law, *Antitrust Law Developments (Fifth)*, at 418 (2004). Here, the Ninth Circuit conceded that Equilon and Motiva represented a complete integration of the downstream gasoline refining and marketing operations of the petitioners. Pet. App. 3a. The petitioners further agreed to share the profits of the joint ventures in fixed ratios based on the assets each contributed to the joint ventures.[2] Pet. App. 4a-5a. Upon the formation of these ventures, petitioners ceased separate refining and marketing of gasoline within the United States and hence ceased competing against each other in those operations. *Id.* at 44a.

The Ninth Circuit and the district court agreed that Equilon and Motiva "produced sufficient efficiencies and were sufficiently integrated to constitute indisputably legitimate joint ventures." Pet. App. 8a. These efficiencies, which included up to $800 million in cost savings annually (*id.* at 3a-6a), would benefit consumers by enabling the ventures to compete more effectively against other larger competitors, such as Exxon, Mobil, and Chevron.

While combining their domestic downstream refining and marketing operations, Shell and Texaco continued to operate separately in downstream gasoline operations in other countries, in refining and marketing of other fuels worldwide, and in domestic and foreign upstream exploration and production operations. Also, while expecting the combination to be permanent, each parent retained the right

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[2] The assets petitioners contributed to Equilon and Motiva are undeniably substantial: 12 refineries, 23 lubricant plants, two research laboratories, 22,000 service stations, more than 24,000 miles of pipeline, 107 terminals, and approximately 24,000 employees. Pet. App. 3a n.3.

to terminate the ventures either by mutual consent or unilaterally (after five years) and to reenter the domestic downstream market on its own, if the venture did not perform to its satisfaction. Pet. App. 4a. Shell and Texaco, therefore, each retained ownership of their respective brand names and trademarks and agreed that the joint ventures would continue to market gasoline under both brands. *Id.* The agreements prohibited the joint ventures from giving preferential treatment to either brand, thereby protecting the valuable goodwill in those well-known brands. *Id.* The joint ventures also adopted as an operating principle a policy of charging the same price for both brands of gasoline where they were sold in the same geographic market (*id.* at 4a-5a), in order to mitigate the risk of potential litigation under the Robinson-Patman Act that differential pricing might otherwise have created.

The Federal Trade Commission and the Attorneys General of four States recognized the potential procompetitive benefits of the two ventures and cleared both ventures, subject to very limited divestitures, after a thorough review. *In re Shell Oil Co.*, 125 F.T.C. 769, 777-793 (1998). The FTC concluded that these divestitures "alleviate[d] the alleged competitive concerns arising from the Joint Ventures." *In re Shell Oil Co., Analysis to Aid Public Comment*, 62 Fed. Reg. 67,868, at 67,869 (Dec. 30, 1997).[3]

3. Notwithstanding the determination by both federal and state antitrust enforcement authorities that the ventures would not substantially lessen competition, respondents brought a putative class action on behalf of 23,000 gas station owners, alleging that the joint ventures' uniform

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[3] Petitioners agreed to divest one refinery, one terminal, and several retail gasoline stations. The ventures' resulting market share nationwide was only 15% and was just over 25% in the western United States. Pet. App. 3a. These shares are well below the threshold necessary to give the ventures market power under this Court's decisions. *See Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 26-27 & n.43 (1984); *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 365-366 (1963).

pricing of Shell and Texaco brand gasoline was horizontal price fixing, in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. Pet. App. 1a. The respondents' complaint disavowed reliance on the rule of reason and asserted instead that the uniform pricing policies were unlawful under either the per se doctrine or a "quick-look" review. *Id.* at 37a. Both petitioners and respondents moved for summary judgment, and the district court granted judgment to petitioners (*id.* at 36a-61a), holding that the joint ventures' uniform pricing policies were not per se unlawful under § 1.

A divided panel of the Ninth Circuit reversed the district court's judgment. Relying principally on *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969), Judge Reinhardt, writing for the majority, held that it would be per se unlawful for the owners of a joint venture to agree to charge a single price for the venture's products, if they are sold under "two distinct brands" (Pet. App. 5a), unless the owners could prove that uniform pricing was "reasonably necessary" to achieve the legitimate procompetitive goals of the joint venture (*id.* at 21a).

Judge Fernandez dissented from that holding, arguing that an agreement between the owners of a "true, bona fide economically integrated joint venture" (Pet. App. 31a) regarding the price the joint venture charged for its own output could not give rise to per se liability under § 1: "What could be more integral to the running of a business than setting a price for its goods and services?" *Id.* at 34a. This Court granted a writ of certiorari to decide whether it can ever be per se illegal under § 1 for an economically integrated joint venture to set the price of its own output.

SUMMARY OF ARGUMENT

1. Section 1 of the Sherman Act does not apply to the decisions of a bona fide, fully integrated joint venture about the pricing of its own products. Such decisions are economically indistinguishable from the pricing decisions of a merged entity, which undeniably constitute unilateral conduct outside the scope of § 1. To subject the pricing deci-

sions of a fully integrated joint venture to treble damages and potential criminal penalties under § 1, as the Ninth Circuit has done here, will discourage the creation of enterprises that produce substantial benefits to American consumers. This Court should accordingly reverse the Ninth Circuit's judgment and hold that § 1 is inapplicable to the pricing decisions of a fully integrated joint venture.

2. Even if § 1 applies to such decisions, the per se rule certainly does not. The Ninth Circuit's conclusion that it can be per se unlawful for a fully integrated joint venture to set a price for the venture's separately branded products, if not reversed by this Court, will expose joint venture partners to a significant risk of per se antitrust liability that cannot be justified under either this Court's precedents or any coherent economic theory.

ARGUMENT

I. SECTION 1 OF THE SHERMAN ACT DOES NOT APPLY TO THE PRICING DECISIONS OF A FULLY INTEGRATED JOINT VENTURE

The Sherman Act draws a "basic distinction between concerted and independent action." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767 (1984) (quoting *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)). The decision of a bona fide, fully integrated joint venture as to the prices it will charge for its own output constitutes independent, unilateral economic activity, which lies outside the scope of § 1. Subjecting such basic operational decisions of a joint venture to scrutiny under § 1 would be economically irrational and would chill incentives to form ventures that contribute to global economic growth.

A. Section 1 Applies Only To Concerted Activity And Does Not Extend To Unilateral Conduct

Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." By its terms, § 1 applies only to concerted activity and "does not

reach conduct that is 'wholly unilateral.'" *Copperweld*, 467 U.S. at 768 (quoting *Albrecht* v. *Herald Co.*, 390 U.S. 145, 149 (1968)). As this Court explained in *Copperweld*, concerted activity "is fraught with anticompetitive risk," because it "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands." 467 U.S. at 768-769. Although unilateral conduct may also harm competition, it is likely to do so only when the single firm "threatens actual monopolization." *Id.* at 767. Hence, unilateral conduct is subject to liability only under § 2 of the Sherman Act.[4]

The metric for determining whether conduct is concerted or unilateral accordingly centers on whether the conduct "deprives the marketplace of the independent centers of decisionmaking that competition assumes." *Copperweld*, 467 U.S. at 769. A restraint that "do[es] not suddenly bring together economic power that was previously pursuing divergent goals," *id.*, is "not an activity that warrants § 1 scrutiny," *id.* at 771. In *Copperweld*, this Court held, therefore, that a parent and its wholly owned subsidiary are incapable of conspiring to violate § 1. *See id.*

B. The Pricing Decisions Of A Fully Integrated Joint Venture Are Unilateral Conduct

1.a. A fully integrated joint venture, which combines the substantial assets of the venturers, is in economic function identical to an entity formed by a merger. In "such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market." *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982). In contributing all of their downstream assets to Equilon and Motiva, the petitioners simultaneously ended their independent participation in the downstream market—just as if the

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[4] Section 2 renders it unlawful for any person "to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2.

transaction were structured as a merger. Equilon and Motiva, although labeled as joint ventures, were therefore economically indistinguishable from a merger. *See Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 230 (D.C. Cir. 1986) ("A joint venture made more efficient by ancillary restraints, is a fusion of the productive capacities of the members of the venture. That, in economic terms, is the same thing as a corporate merger."); *see also SCFC ILC, Inc.* v. *Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir. 1994) ("[E]fficiencies created by joint ventures are similar to those resulting from mergers—risk-sharing, economies of scale, access to complementary resources and the elimination of duplication and waste."). "This reality must control, rather than the organizational form chosen by the enterprise, for that form reflects valid management purposes without increasing any anticompetitive potential." VII Areeda & Hovenkamp, *Antitrust Law* ¶1463h, at 203 (2d ed. 2003).

b. Where, as here, the parties to a fully-integrated joint venture share the aggregate profits or losses of the venture in a fixed ratio, the venturers have a unity of economic purposes insofar as pricing and output decisions of the venture are concerned and, therefore, do not pursue "separate economic interests."[5] *Copperweld*, 467 U.S. at 769, 771. Such an "agreement to divide profits and losses" means the venturers "function as an economic unit and are generally treated as a single entity." *Freeman* v. *San Diego Ass'n of Realtors*, 322 F.3d 1133, 1148 (9th Cir. 2003); *see Maricopa County*, 457 U.S. at 356 (single entity rule applies to "joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit").

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[5] Indeed, upon the subsequent merger of Chevron and Texaco in 2002, the FTC permitted Shell to buy out Texaco's interests in Equilon and Motiva because the assets of the two ventures were already "under common ownership and control, and divestiture of these interests to Shell . . . would closely maintain the situation that currently exists." *In re Chevron Corp., Analysis to Aid Public Comment*, 66 Fed. Reg. 48,136, at 48,143 (Sept. 18, 2001).

c. Although the act of combining "two erstwhile competitors" in a joint venture, as Shell and Texaco did in forming both Equilon and Motiva, is subject to § 1, *Freeman*, 322 F.3d at 1147, neither the respondents nor the Ninth Circuit dispute the legality of the formation of the two joint ventures. Once a joint venture is formed, the venture's post-formation pricing of its own output does not result in any further loss of "independent centers of decisionmaking." *Copperweld*, 467 U.S. at 769; *see* Werden, *supra*, at 705 n.18 ("Such an 'agreement on price' does not eliminate independent decision making among competitors, and thus is not even akin to price fixing.").

As the leading treatise in the field persuasively argues, "[O]nce a firm is lawfully created, we focus on its behavior rather than that of its original creators." VII Areeda & Hovenkamp, *supra*, ¶1462a, at 193; *see id.* ¶1476a, at 306 ("Once lawfully formed, the corporation's acts are those of a single entity."). Indeed, "it would be inconsistent to prevent [a joint venture] from functioning by characterizing its normal operations as per se or otherwise unlawful conspiracies." *Id.* ¶1475b, at 304; *see* Werden, *supra*, at 704-705 ("[A] joint venture, once formed, necessarily acts as a single economic entity. When a joint venture itself participates in the marketplace, its ordinary actions as a market participant are those of a single entity.").

Acknowledging that "of course . . . joint ventures may price their products," the Ninth Circuit distinguished this case from that concededly legitimate practice by observing that there was some evidence in the record that petitioners agreed to charge uniform prices for Shell and Texaco brand gasoline at the time the venture was formed, instead of leaving that decision to the venture itself. *See* Pet. App. 5a n.4, 19a n.11, 27a. This "distinction" elevates form over substance.

Where the owners of a joint venture have exited the market in which the venture competes, an agreement between the owners regarding the pricing of the venture's output is no more concerted action within the meaning of § 1

than is a decision by the partners in a new law firm as to the rates the firm will charge for their legal services. Because those pricing decisions do not affect the behavior of the participants in their nonventure business, they should generally be "regarded as those of a single entity rather than the parents' daily conspiracy." VII Areeda & Hovenkamp, *supra*, ¶1478c, at 325. In contrast to an agreement among the parties to a joint venture as to the prices the parties will charge for their respective output prior to the consummation of a transaction, decisions regarding the price of the venture's own post-formation output, even if reached at the time the venture is formed, do not "deprive[] the marketplace," *Copperweld*, 467 U.S. at 769, of any additional increment of independent decisionmaking beyond that lost through the formation of the joint venture. Whether these decisions are reached during pre-closing integration planning or shortly after the venture is formed is of no moment; such decisions implicate none of the special "anticompetitive risk[s]" associated with concerted activity, *id.* at 768-769. Therefore, treating these decisions as concerted activity would not advance the "statutory policy distinguishing unilateral from concerted behavior." VII Areeda & Hovenkamp, *supra*, ¶1476a, at 306.

2. Holding that § 1 does not apply to a decision by the owners of a joint venture as to the pricing of the venture's output would not exclude the application of § 1 to other agreements between the owners that do have the potential to restrain trade. Federal appellate courts have correctly recognized that the conduct of a joint venture may be treated as that of a single entity when it relates to the sale of a venture's own output, but as concerted action when it curtails competition among the joint venture partners themselves. *See Chicago Prof'l Sports Ltd. P'ship* v. *National Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996) (NBA may be "best understood as one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment," but as a concert of multiple firms "when curtailing competition for players who have few other market opportunities"); *City of Mount Pleasant* v. *As-*

sociated Electric Cooperative, 838 F.2d 268, 276 (8th Cir. 1988); *see also* VII Areeda & Hovenkamp, *supra*, ¶1478a, at 319 (characterization as a single entity "seems appropriate for venture activities not governing the members' conduct, while the 'continuing conspiracy' answer seems wise for rule-making activities and for those developments which could make continued collaboration unreasonable for the future").

3. Finally, the panel majority contends that setting different prices for Shell and Texaco brand gasoline would have been competitively preferable to setting a uniform price for both products. Pet. App. 23a-24a. It is entirely irrelevant under § 1 whether joint venturers set a single price or different prices for the venture's own output; the competitive concern under § 1 is whether the pricing policies "deprive[] the marketplace of the independent centers of decisionmaking that competition assumes and demands," *Copperweld*, 467 U.S. at 769, not whether those pricing policies are, in some sense, optimal.

As this Court recently emphasized, the Sherman Act "is indeed the 'Magna Carta of free enterprise,'" but it does not empower judges to condemn behavior whenever they suspect that "some other approach might yield greater competition." *Verizon Commc'ns, Inc.* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398, 415-416 (2004) (quoting *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972)). The owners of a joint venture should be free to exercise their business judgment as to the pricing of the venture's output unhampered by judicial second-guessing of their decisions under § 1. *See Chicago Prof'l Sports*, 95 F.3d at 597 ("[T]he antitrust laws do not deputize district judges as one-man regulatory agencies.").

What is "competitively preferable" is obviously in the eyes of the beholder. It may well be, for example, that some partners in a law firm would prefer to charge lower rates for their services than other partners in the same firm, given different supply and demand conditions in, say, the market for antitrust advice and the market for securities advice. No

one would suggest that an agreement among a law firm's partners to charge a uniform rate for their services should be considered illegal concerted activity under § 1, notwithstanding such differing preferences. *See Rothery*, 792 F.2d at 224 n.10 ("Although literally price fixing among competitors, fee schedules imposed by a law partnership are accepted, even taken for granted."). There is no reason to treat the pricing decisions at issue here any differently.

C. Imposing Section 1 Liability On The Pricing Decisions Of A Fully Integrated Joint Venture Will Discourage An Important Form Of Business Organization

"[A] business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability." *Copperweld*, 467 U.S. at 773. The Ninth Circuit's decision, however, imposes liability on a pure matter of business judgment—the pricing of a joint venture's own output—that would be beyond the reach of regulatory scrutiny under § 1 had the parties simply structured their transaction as a "merger" rather than a "joint venture." *Cf. id.* at 772 ("Antitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary."). That result "serves no valid antitrust goals but merely deprives consumers and producers of the benefits" of joint venture transactions. *Id.* at 774.

1. Antitrust liability distorts economic incentives to engage in business transactions if courts apply it in ways that treat economically similar entities dissimilarly. *See generally* Shapiro & Willig, *On the Antitrust Treatment of Production Joint Ventures*, 4 J. Econ. Persp. 113 (1990). Subjecting bona fide, economically integrated joint ventures, such as Equilon and Motiva—which are functionally identical to merged entities, and which were treated as such by both the FTC and state attorneys general—to antitrust standards different from those applied to merged entities may discourage use of the joint venture form in order to

minimize the expected cost of antitrust liability.[6] *See* Chang et al., *supra*, at 263-264 ("Antitrust policy that places joint ventures at a competitive disadvantage would artificially reduce the incentives of entrepreneurs and investors to choose this organizational form in the first place."); *cf. United States* v. *Penn-Olin Chem. Co.*, 378 U.S. 158, 170 (1964) ("Overall, the same considerations apply to joint ventures as to mergers, for in each instance we are but expounding a national policy . . . to preserve and promote a free competitive economy.").

This distortionary effect is sub-optimal because it discourages business parties from choosing the most efficient organizational form for their transaction. *See* Piraino, Jr., *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures*, 76 Minn. L. Rev. 1, 8 (1991) ("From an antitrust standpoint, it is preferable to achieve efficiencies through joint ventures rather than by mergers."); *see also Copperweld*, 467 U.S. at 775 ("Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote."). Therefore, any such disparity in antitrust liability between a bona fide joint venture and a merged entity in terms of pricing their output should be eliminated. *See* Chang et al., *supra*, at 262 ("[A]ntitrust policy should not bias the selection of a form of business organization . . . . [Economic actors] should have the proper incentives to choose the most efficient organizational form."); *id.* at 265-266 (arguing regulators should strive to reduce the distortionary effect of "the antitrust tax on efficient economic behavior").

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[6] Indeed, the FTC's and the DOJ's Competitive Collaboration Guidelines expressly contemplate that a joint venture almost identical to those at issue here would be analyzed "under the Horizontal Merger Guidelines, rather than as a competitor collaboration [subject to § 1]." FTC & DOJ, Antitrust Guidelines for Collaboration Among Competitors § 1.3, Ex. 1 (analyzing a joint venture in which "[t]wo oil companies agree to integrate all of their refining and refined product marketing operations," but "maintain separate crude oil operations").

Treating a legitimate joint venture's pricing decisions regarding its own products as unilateral conduct would have other procompetitive benefits. It would have the salutary effect of foreclosing "difficult, intensive scrutiny of . . . intra-enterprise activities under extremely generalized rule of reason standards" and of preventing "claims, clearly inappropriate, . . . under per se rules or precedents dealing with arrangements between existing independent competitors." *Fraser* v. *Major League Soccer, L.L.C.*, 284 F.3d 47, 59 (1st Cir. 2002) (nonetheless declining to conclude that MLS was a single entity exempt from § 1 liability); *see* Werden, *supra*, at 705 n.18 (treating joint venture pricing decisions as unilateral action would permit "meritless . . . price-fixing claims, which could erroneously be decided under the per se rule, to be rejected as a matter of law").

2. Contrary to the Ninth Circuit's fears (Pet. App. 28a), holding that the pricing decisions of a fully integrated joint venture constitute unilateral conduct outside the scope of § 1 would not permit cartels to masquerade as fronts for price fixing. This Court has amply illustrated its ability to uncover sham joint ventures and to apply § 1 where the joint venture is not a bona fide economic integration.

For example, in *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 597 (1951), this Court rejected an attempt to avoid § 1 liability by disguising a naked market division scheme as a "joint venture." It properly concluded that the restriction at issue was in reality a cover for a per se unlawful agreement to divide territories and fix prices. *Id.* Similarly, in *Palmer* v. *BRG of Georgia, Inc.*, 498 U.S. 46, 48-50 (1990) (per curiam), this Court summarily rejected an attempt to disguise a naked market division agreement as a joint venture. And in *Maricopa County*, this Court found a medical foundation was "not analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit." 457 U.S. at 356. Accordingly, it had no trouble determining that the foundation's practice of setting maximum fee schedules for

doctors competing to provide medical services was naked price-fixing and per se illegal under § 1. *Id.* at 356-357.

II. THE NINTH CIRCUIT ERRED IN HOLDING THAT A JOINT VENTURE'S PRICING OF ITS OWN OUTPUT COULD BE A PER SE ILLEGAL "NAKED" RESTRAINT

Even if § 1 were applicable to a joint venture's pricing of its own output, this Court should still reverse the Ninth Circuit's judgment. In light of the undisputed evidence that Equilon and Motiva are legitimate joint ventures, designed to achieve substantial efficiencies by fully integrating the petitioners' downstream refining and marketing operations (Pet. App. 5a, 50a), this Court's statement in *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), makes it clear that decisions as to how the joint ventures should price their output cannot be treated as per se unlawful price fixing. *Id.* at 9 ("When two partners [in a joint venture] set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act.")

Despite a passing nod to the principles enunciated in *BMI* (Pet. App. 15a), the panel ignored *BMI*'s clear application to this case and, in a deviation from traditional joint venture analysis, held that a joint venture's uniform pricing policy could constitute per se unlawful "naked" price fixing unless the policy was "reasonably necessary" to achieve the efficiencies promised by the joint venture. *Id.* at 21a. This holding rests on two fundamental misunderstandings of the proper scope of the per se doctrine under § 1.

First, the Ninth Circuit's holding fails to recognize that per se illegality for horizontal price fixing is limited to agreements "among competitors on the way in which they will compete with one another." *NCAA* v. *Board of Regents*, 468 U.S. 85, 99 (1984). Here, because Shell and Texaco have exited the downstream markets in which Equilon and Motiva operate, they no longer compete in those markets and any agreement between them as to the prices charged by

the ventures in those markets cannot constitute a per se illegal horizontal price fixing agreement.

Second, even if this case involved a horizontal agreement—which it does not—the Ninth Circuit's holding confuses the test for the ultimate legality of an alleged restraint with the threshold question of whether a restraint is "naked" for the purpose of determining whether it is per se unlawful or requires rule of reason review. Under this Court's prior decisions, a restraint is "naked" only if it "*facially* appears to be one that would always or almost always tend to restrict competition and decrease output," rather than "one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *BMI*, 441 U.S. at 19-20 (emphasis added) (quoting *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978)).

Applying this standard, a restraint may not be condemned per se unless there are no "*plausible* arguments that [it was] intended to enhance overall efficiency and make markets more competitive." *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985) (emphasis added); *see White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963) (naked restraint has "no purpose except stifling of competition"). If there is a plausible procompetitive explanation for an alleged restraint, then a court must instead evaluate the restraint under the rule of reason, with the plaintiff having the burden of proving both that the restraint will harm competition and that the restraint is not reasonably necessary to achieve the claimed procompetitive purposes. *See California Dental Ass'n* v. *FTC*, 526 U.S. 756, 771-775 (1999); *Schering-Plough Corp.* v. *FTC*, 402 F.3d 1056, 1065 (11th Cir. 2005), *pet'n for cert. filed*, ___ U.S.L.W. ___ (Aug. 29, 2005) (No. 05-273).[7]

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[7] Under the rule of reason, the plaintiff may be relieved of the burden of proving that the restraint is not reasonably necessary if the defendant is unable to substantiate its claims that the restraint serves a procompetitive purpose or if, on further scrutiny, it is apparent that the anticompetitive effects of the restraint outweigh its competitive benefits. *See*

Requiring joint venture owners to prove that their uniform pricing policy was "reasonably necessary to further the legitimate aims of the joint venture" to escape per se illegality, as the Ninth Circuit did here (Pet. App. 21a), puts the cart before the horse. If accepted, it would overturn nearly 30 years of well-established antitrust jurisprudence and would leave judges and juries free to second-guess the business decisions of joint venture partners, even where there is no conceivable harm to competition.

A. Per Se Illegality Is A Narrow Exception To The Rule Of Reason

Ever since *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911), the rule of reason has been the standard mode of analysis for evaluating the legality of an alleged restraint of trade under § 1 of the Sherman Act. *See State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997). Beginning in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), this Court has carved out a narrow exception from the rule of reason for those agreements that are so plainly anticompetitive and so often lacking in any redeeming virtue that they should conclusively be presumed illegal without further examination. *See National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 692 (1978). This narrow class of per se unlawful restraints includes naked horizontal price fixing agreements, which this Court has labeled one of the "paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit." *NCAA*, 468 U.S. at 107-108.

1. During the 1960s, this Court dramatically expanded the use of the per se label, applying it to concerted refusals to deal, vertical nonprice restraints, maximum resale price

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NCAA, 468 U.S. at 110. This type of truncated rule of reason analysis is sometimes referred to as a "quick look." *See California Dental*, 526 U.S. at 763. Here, the Ninth Circuit determined it was unnecessary to apply quick-look review because the respondents had established the per se illegality of the Equilon's pricing policy. Pet. App. 13a n.7.

maintenance, tying, and even certain joint venture agreements. This Court has since recognized, however, that this over-expansion of the per se doctrine resulted in "antitrust theories so abbreviated as to prevent proper analysis." *California Dental*, 526 U.S. at 794 (Breyer, J., dissenting).

2. Accordingly, in its decisions over the last 30 years, this Court has overruled or limited most of its decisions extending the per se doctrine beyond naked price fixing and market division agreements. These more recent opinions have cabined per se illegality as a limited exception to the rule of reason, one that can properly be applied only to a very narrow category of restraints that the Court has concluded, "after considerable experience," are "so plainly anticompetitive and so often lack any redeeming virtue that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases." *BMI*, 441 U.S. at 8-9 (quotation omitted); *see NCAA*, 468 U.S. at 103-104 ("Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."); *Continental T.V., Inc.* v. *GTE Sylvania*, 433 U.S. 36, 49-50 (1977) ("Per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive."). For example:

- In *GTE Sylvania*, this Court overruled *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1968), and held that vertical nonprice restraints were not subject to per se condemnation. *See* 433 U.S. at 47-50;
- In *BMI*, in light of plausible procompetitive benefits this Court declined to apply the per se rule to a blanket license, which aggregated the licensing rights to multiple musical works into a single license sold at a single price. *See* 441 U.S. at 20-24;
- In *State Oil*, this Court overruled *Albrecht* and held that vertical maximum price fixing was no longer per se unlawful. *See* 522 U.S. at 7;

- In *Northwest Wholesale Stationers*, this Court declined to apply the per se rule to the membership rules of a wholesale purchasing cooperative, where those rules arguably advanced the procompetitive purposes of the cooperative. *See* 472 U.S. at 295-297;
- And in *Jefferson Parish*, this Court refused to apply the per se rule summarily to a tying arrangement, instead requiring proof of market power in the tying good to show per se illegality. *See* 466 U.S. at 13-16.

In those decisions this Court admonished federal courts to avoid "overly simplistic" and "overbroad" applications of the per se label. *BMI*, 441 U.S. at 9. Warning that "easy labels do not always supply ready answers," *id.* at 8, this Court has cautioned that not all agreements as to price constitute per se unlawful price fixing. The term price fixing, "[a]s generally used in the antitrust field, . . . is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable." *Id.* at 9; *see also Maricopa County*, 457 U.S. at 361-362 (Powell, J., dissenting) (price fixing label "is not to be applied as a talisman to every arrangement that involves a literal fixing of prices. Many lawful contracts, mergers, and partnerships fix prices. But our cases require a more discerning approach").

Rather than relying on formal labels, "[a] plaintiff seeking application of the per se rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects." *Northwest Wholesale Stationers*, 472 U.S. at 298; *see GTE Sylvania*, 433 U.S. at 58-59 ("[D]eparture from the rule-of-reason standard must be based upon demonstrable economic effect, rather than . . . upon formalistic line drawing."); *Law* v. *NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998) ("[T]he *per se* rule is a 'demanding' standard that should be applied only in clear cut cases.") (quoting *GTE Sylvania*, 433 U.S. at 50).

3. These decisions have restored the rule of reason as the presumptive mode of analysis in § 1 cases. *See State Oil*, 522 U.S. at 10; *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*,

485 U.S. 717, 726 (1988) ("[T]here is a presumption in favor of a rule-of-reason standard.").

The rule of reason requires a court to examine the alleged restraint, taking into account all surrounding circumstances, including any likely anticompetitive effects and any claimed procompetitive justifications, to determine whether the net effect of a restraint is to harm consumer welfare through higher prices and reduced output. *See Standard Oil*, 221 U.S. at 58 (reasonableness of restraint depends on whether the restraint would "restrain[] the free flow of commerce and tend[] to bring about . . . the enhancement of prices" or would instead "develop[] trade"). As refined over the years, both by this Court and by other federal courts, the rule of reason requires a three-step analysis. *See generally FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 460-461 (1986); *Schering-Plough*, 402 F.3d at 1065; *United States* v. *Visa USA, Inc.*, 344 F.3d 229, 238 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 45 (2004); *Law*, 134 F.3d at 1019. First, the plaintiff bears the initial burden of proving that the alleged agreement has caused, or is likely to cause, anticompetitive effects within the relevant market. If the plaintiff establishes the likelihood of such effects, then the burden shifts to the defendant to show that the challenged conduct advances a procompetitive purpose, sufficient to outweigh any anticompetitive effect. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the restraint is not reasonably necessary to achieve the stated objective.

4. Notwithstanding the panel majority's mistaken belief that this Court follows a "two-tiered mode of analysis" (Pet. App. 12a), this Court's recent antitrust jurisprudence has emphasized that the per se and the rule of reason approaches are the end points of an analytical continuum that a court may apply in evaluating the legality of an alleged restraint of trade. *See California Dental*, 526 U.S. at 780-781 ("[T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more

detailed treatment."); *NCAA*, 468 U.S. at 104 n.26 ("[T]here is often no bright line separating per se from Rule of Reason analysis."); *Polygram Holding, Inc.* v. *FTC*, 416 F.3d 29, 35 (D.C. Cir. 2005) (this Court "has backed away from any reliance upon fixed categories and toward a continuum").

What ultimately is required is "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint," in order to determine whether "the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one." *California Dental*, 526 U.S. at 781.

5. The principal authority relied on by the panel majority (Pet. App. 17a-21a) for its erroneous approach is *Citizen Publishing*, which was decided at the height of what this Court has since recognized as an overly-exuberant expansion of the per se concept. *See* above, at pp. 16-19. Justice Douglas, writing for the Court, held that a joint venture combining the newspaper printing and distribution businesses of Tucson's only two newspapers was per se unlawful under § 1. *See* 394 U.S. at 135. Justice Douglas' application of the per se label to the joint venture was almost wholly gratuitous and not necessary to the Court's decision because the Court further treated the "venture as a merger . . . to an absolute monopoly of Tucson's daily newspapers." XIII Areeda & Hovenkamp, *supra*, ¶2121c, at 130. By contrast, the joint venturers here are just two of a large number of gasoline refiners and marketers, and their combination poses no threat of monopolizing the downstream gasoline market. The anticompetitive concerns driving the outcome in *Citizen Publishing* are, therefore, entirely absent in this case.

It is also difficult to square the invocation of the per se label in *Citizen Publishing* with this Court's decisions over the last 30 years. For the reasons developed below, this Court should clarify that to the extent *Citizen Publishing* stands for the proposition that an agreement between the owners of a joint venture as to the pricing of the venture's

output can constitute per se unlawful price fixing, *Citizen Publishing* has been overruled by *BMI*, *NCAA*, and *Maricopa County* and is no longer good law.[8] *Cf. Rothery*, 792 F.2d at 226 (observing with respect to similar joint venture decisions decided during the same period as *Citizen Publishing*, "to the extent [those cases] stand for the proposition that all horizontal restraints are illegal per se, they must be regarded as effectively overruled" by *BMI*, *NCAA*, and later decisions).

B. An Agreement Between The Owners Of A Fully-Integrated Joint Venture Regarding The Venture's Output Can Not Be A Per Se Unlawful Horizontal Price-Fixing Agreement Because It Is Not An Agreement Between Competing Sellers

The Ninth Circuit's first fundamental error in holding that joint venturers' decisions about the pricing of the venture's output could be per se unlawful was in treating the decision by the petitioners to adopt that policy as a horizontal agreement. The decisions of both this Court and the federal circuit courts of appeal clearly define horizontal price-fixing as an agreement among sellers of competing products on the price that they will charge for the competing products. *See BMI*, 441 U.S. at 8 (price-fixing consists of "agreements among *competitors* to fix prices on their individual goods or services") (emphasis added); *Augusta News Co.* v. *Hudson News Co.*, 269 F.3d 41, 47 (1st Cir. 2001) ("The only price-fixing agreements that are condemned *per se*, with one narrow exception (minimum resale price-fixing) are agreements (1) between competitors (2) as to competing products or services (3) where, in addition, the agreement is not part of a larger, legitimate economic venture.").

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[8] It is worth noting that Justice Douglas' opinion engendered such concern that it led the Congress to overrule *Citizen Publishing* by enacting the Newspaper Preservation Act, 15 U.S.C. §§ 1801 *et seq.*, which grants newspaper joint operating agreements a limited exemption from the antitrust laws. *See Hawaii Newspaper Agency* v. *Bronster*, 103 F.3d 742, 744-745 (9th Cir. 1996).

More generally, this Court has defined a horizontal agreement as an "agreement among competitors on the way in which they will compete with one another." *NCAA*, 468 U.S. at 99. Here, there is no dispute that the uniform pricing policies at issue govern only sales by the joint ventures and never fixed the prices of any products Shell or Texaco sold individually outside the ventures. Indeed, since the joint venture agreements prohibit the petitioners from "continu[ing] to compete . . . in the relevant market," *SCFC*, 36 F.3d at 963, any agreement between Shell and Texaco as to the prices the venture will charge for its products cannot be an agreement regarding "competition with one another." *NCAA*, 468 U.S. at 99. Without that necessary horizontal element, the agreement cannot be a per se unlawful price-fixing agreement.

C. An Alleged Restraint Cannot Be Per Se Unlawful So Long As It Arguably Furthers The Legitimate Objectives Of A Bona Fide Joint Venture

The Ninth Circuit's second fundamental error was in holding that a pricing policy admittedly adopted in connection with a bona fide integration of economic activities is "naked," and hence unlawful per se, unless the petitioners can prove that the policy is "reasonably necessary" to achieve the legitimate purposes of the venture. Pet. App. 21a. This holding flies in the face of this Court's prior decisions, which require only that there be "plausible arguments" that an alleged restraint will advance the legitimate purposes of the venture and thereby "enhance overall efficiency and make markets more competitive." *Northwest Wholesale Stationers*, 472 U.S. at 294; *accord BMI*, 441 U.S. at 19-20; *Polk Bros., Inc.* v. *Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir. 1985) (if a restraint "arguably" promotes "enterprise and productivity," then "the court must . . . make a more discriminating assessment" than applying the per se rule).

1. This Court's decisions in *BMI*, *Northwest Wholesale Stationers*, *NCAA*, and *California Dental* illustrate the lim-

ited scope of the review courts are to undertake in determining whether an alleged restraint is "naked."

In *BMI*, this Court concluded that the blanket license offered by BMI "was not a 'naked restrain[t] of trade with no purpose except stifling of competition" because it facially facilitated "the integration of sales, monitoring, and enforcement against unauthorized copyright use." 441 U.S. at 20-21 (quoting *White Motor*, 372 U.S. at 263). This was enough, the Court held, to warrant rule of reason review.

Similarly, in *Northwest Wholesale Stationers*, this Court rejected an argument that a wholesale purchasing cooperative's expulsion of a member was per se unlawful because it determined that expulsion would not "characteristically be likely to result in predominantly anticompetitive effects." 472 U.S. at 296. The Court further recognized that, in contrast to *NCAA* and other cases, there were "plausible arguments" to support the procompetitive benefits of allowing a purchasing cooperative to expel members in order to achieve the economic benefits of such cooperatives. *Id.* at 294-296.

In *NCAA*, this Court declined to apply the per se rule to the NCAA's restrictions on its members' telecasts of college football games because "a certain degree of cooperation is necessary if the type of competition"—intercollegiate football—"is to be preserved." 468 U.S. at 117; *see id.* at 101 ("this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all"). The Court reached this conclusion even though it found in its abbreviated rule-of-reason review that the particular restraint at issue was "not even arguably tailored to serve" the NCAA's interest in "maintenance of a competitive balance" among NCAA football teams. *Id.* at 119.

Finally, and most recently, in *California Dental* this Court vacated the FTC's use of quick-look review to invalidate a professional association's restriction on its members' advertising. *See* 526 U.S. at 771. Because information asymmetries in the market for dental services rendered "plausible" the procompetitive explanations offered by the

dental association for its advertising restrictions, this Court held that a more thorough rule of reason analysis was required to determine the legality of the restrictions. *See id.* at 771-773.

2. The Ninth Circuit paid lip service to these cases, but then deviated from them by holding that in order to be viewed as "ancillary" to a legitimate joint venture agreement and, therefore, not a per se illegal naked restraint, the restraint must be "reasonably necessary to further the legitimate aims of the venture." Pet. App. 21a. In the majority's view, the case turned on "whether the defendant's conduct—setting one, unified price for both the Texaco and Shell brands of gasoline instead of setting each brand's price independently on the basis of normal market factors—is reasonably necessary to further the legitimate aims of the joint venture." *Id.*; *see id.* at 22a & n.14.

By imposing so high a threshold to avoid per se liability, the court mistakenly conflated the standard for per se illegality with the test for determining the ultimate lawfulness of an ancillary restraint after a full rule-of-reason review. The ancillary restraints doctrine was imported from the common law into the antitrust lexicon by Judge (later Chief Justice) Taft in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899). Writing before either the per se doctrine or the rule of reason had yet been invented, Judge Taft addressed the legality of restraints "ancillary" to the formation of a partnership or other business collaboration. "Restrictions in the articles of partnership upon the business activity of the members with a view of securing their effort in the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged." *Id.* at 280. Such restrictions are lawful so long as they are "necessary to protect ... the enjoyment of the legitimate fruits of the contract, or to protect ... from the dangers of an unjust use of those fruits by another party." *Id.* at 282. As initially used by Judge Taft, and subsequently in ensuing cases, the "reasonably necessary" test, *id.* at 281, therefore addresses the

ultimate legality of the restraint, not whether it is a "naked" restraint subject to per se condemnation.

3. As the United States correctly stated in its brief in support of the petitions for certiorari in this case (Br. at 13-16 & n.21), the *Addyston Pipe* ancillary restraint doctrine does not apply here because the joint ventures' pricing policies did not restrain the conduct of the partners to the joint venture, but only the venture itself. In misapplying that doctrine here, the Ninth Circuit also mistakenly used *Addyston Pipe*'s "reasonably necessary" standard to determine whether an alleged restraint is naked, and therefore per se illegal, rather than as the final step in applying the rule of reason to a restraint that has been shown to harm competition. That approach is completely contrary to this Court's decisions in *BMI*, *NCAA*, and *California Dental*. The conflict is evident from the dichotomy espoused by the Ninth Circuit in which "price fixing is 'naked' (in which case the restraint is illegal) or 'ancillary' (in which case it is not)." Pet. App. 16a. This formulation ignores the entire middle ground of restraints that are neither per se legal nor per se illegal, but that must be judged against the rule of reason to determine their likely net effect on competition.

D. Petitioners' Policy Of Charging The Same Prices For Their Two Brands Of Gasoline Was Not A "Naked" Restraint Of Trade

The dangers inherent in using a "reasonably necessary" standard to classify the pricing decisions of a fully-integrated joint venture as a naked restraint that is per se illegal are amply illustrated by the panel's decision here. In finding that petitioners had not shown that "unified pricing . . . further[s] the ventures' legitimate efforts to produce better products or capitalize on efficiencies" (Pet. App. 23a), the panel majority observed that its "analysis would be different" if the parties had combined their two product lines into one or eliminated the old product lines and invented an entirely new one. *Id.* at 28a; *see id.* at 15a. This Court's prior decisions (*see* above at pp. 22-24), do not permit a court to substitute its business judgment, in this manner, for that of

the parties as to how a joint venture should market its products and at what prices.

1. Given the valuable goodwill the two parent companies had developed in their two well-known brands, there were obviously good, procompetitive reasons for their two joint ventures to continue to market both brands, rather than try to introduce a single common brand. Among other things, marketing under both brands would provide a means to differentiate them, thereby appealing to a wider range of customers and competing more effectively against the brands of other gasoline manufacturers. *See* Carlton & Perloff, *Modern Industrial Organization* 326-332 (1990).

As the district court aptly noted, it makes no economic sense to require the joint ventures "to abandon or devalue long-standing investments in brand good-will to avoid per se" condemnation. Pet. App. 47a. Just as with the territorial restraints in *GTE Sylvania*, the existing Shell and Texaco brands were "valuable competitive tools," and it would be "unduly artificial" to deny the joint ventures the use of those brands in order to escape per se illegality. *See* 433 U.S. at 58 n.29.

2. Once a decision was made to continue to market both brands, how those brands were priced was purely a matter of business judgment, not a per se illegal naked restraint of trade. From its very earliest decisions under the Sherman Act to its most recent, this Court has consistently emphasized that courts should not base antitrust decisions on the reasonableness of the prices charged, lest they become price regulators. *See, e.g., Trinko*, 540 U.S. at 406 (courts are "ill-suited" to "act as central planners, identifying the proper price, quality, and other terms of dealing"); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 396 (1927) ("We should hesitate to a adopt a construction making the difference between legal and illegal conduct . . . depend upon so uncertain a test as whether prices are reasonable."). Yet that is exactly what the court of appeals did here in holding that petitioners' uniform pricing policy could be found per se unlawful, without any empirical evidence of any harm to competi-

tion, simply because it did not see any need for the joint ventures to charge the same prices for both brands of gasoline. The threat of per se liability on so arbitrary a basis would "create precisely the kind of 'irrational dislocation in the market' that legal rules in this area should be designed to avoid." *Bus. Elecs.*, 485 U.S. at 729 n.3 (quoting *Monsanto*, 465 U.S. at 764).

The ability to price one's products free of government interference is essential to the efficient functioning of the "central nervous system of the economy." *Socony-Vacuum*, 310 U.S. at 226 n.59. This Court's decisions do not countenance a court second-guessing a joint venture's pricing policies without having even inquired as to "whether the effects actually are anticompetitive." *California Dental*, 526 U.S. at 775 n.12.

Here, there were plainly sound business reasons for petitioners to adopt a policy of charging the same price for both brands of gasoline where they were sold in the same geographic market. As petitioners argued below, that policy protected the ventures against the risk of expensive and burdensome litigation under § 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a).[9] Charging the same prices for both

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[9] In rejecting this justification as "wholly without merit" (Pet. App. 26a), the Ninth Circuit did not even mention the leading decision of this Court, *FTC* v. *Borden Co.*, 383 U.S. 637, 640, 643-645 (1966), which holds that a single seller who charges different prices for different brands of a single product violates § 2(a) unless it can show that the differences in price were cost justified. The panel also failed to address *In re Standard Oil Co.*, 49 F.T.C. 923, 952 (1953), in which the FTC held that the chemical composition of gasoline is not the most "important competitive factor" in determining whether a products are of a like grade and quality under § 2(a).

In light of these precedents, there was a risk that, absent uniform pricing of the two branded gasolines, a customer could bring a nonfrivolous price discrimination claim. Even if the petitioners might ultimately have prevailed on such a claim, it is entirely rational for joint venture partners to adopt a pricing policy that will minimize the costs and uncertainty of potential litigation under § 2(a), which could have nullified some of the cost savings the parties expected to realize from their ven-

brands of gasoline, on its face, also furthered the efficient operation of the two ventures by helping to assure that the joint ventures would not give preferential treatment to either brand. In any cooperative endeavor, the danger of such opportunistic behavior is a source of potential inefficiencies that can undermine the entire venture. *See* Williamson, *The Economic Institutions of Capitalism* 64-67 (1985). Mitigating the risk of such behavior has, for that reason, always been recognized as a legitimate business justification for an alleged restraint of trade. *See Addyston Pipe*, 85 F. at 280 (protecting "legitimate fruits" of contract from "unjust use by another party" may justify restraint).

3. For these reasons, the uniform pricing policy was, without question, "part of a larger endeavor whose success [it] promotes." *Polk Bros.*, 776 F.2d at 188-189. The decision to adopt that policy was made at the very outset of the venture and, on its face, served to mitigate risks that might otherwise have imperiled the venture's success. To the extent they were subject to § 1 at all, the petitioners' pricing policies should therefore have been evaluated under the rule of reason, not condemned as unlawful per se, even if the ancillary restraints doctrine applied. *Id.* at 189-190 (a restraint that "play[s] an important role in inducing" two partners to engage in "a cooperative venture that promises greater productivity and output" must be evaluated under the rule of reason).

* * *

The Ninth Circuit's treatment of the pricing decisions of a fully integrated, procompetitive joint venture as a per se unlawful naked restraint is completely contrary to both this Court's precedents and economic common sense. Per se

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ture. *Cf. Schering-Plough*, 402 F.3d at 1075 ("There is no question that settlements provide a number of private and social benefits as opposed to the inveterate and costly effects of litigation."). Indeed, the "intensified guesswork involved with lengthy litigation cuts against the benefits proposed by a rule that forecloses" uniform pricing of multiple brands by a joint venture. *Id.*

analysis necessarily produces a certain number of "false positives." VII Areeda & Hovenkamp, *supra*, ¶1509c, at 403. The likelihood of such false positives resulting from the application of the per se doctrine to the pricing policies of bona fide joint ventures—a likelihood that came to fruition in the instant case—would undermine the incentive to create welfare-enhancing joint ventures that are increasingly important to the global economy and would thereby "'chill the very conduct the antitrust laws are designed to protect.'" *Trinko*, 540 U.S. at 414 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 2005

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TEXACO INC. *v.* DAGHER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04–805. Argued January 10, 2006—Decided February 28, 2006*

Petitioners, Texaco Inc. and Shell Oil Co., collaborated in a joint venture, Equilon Enterprises, to refine and sell gasoline in the western United States under the two companies' original brand names. After Equilon set a single price for both brands, respondents, Texaco and Shell Oil service station owners, brought suit alleging that, by unifying gas prices under the two brands, petitioners had violated the *per se* rule against price fixing long recognized under §1 of the Sherman Act, see, *e.g.*, *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U. S. 643, 647. Granting petitioners summary judgment, the District Court determined that the rule of reason, rather than a *per se* rule, governs respondents' claim, and that, by eschewing rule of reason analysis, respondents had failed to raise a triable issue of fact. The Ninth Circuit reversed, characterizing petitioners' position as a request for an exception to the *per se* price-fixing prohibition, and rejecting that request.

Held: It is not *per se* illegal under §1 of the Sherman Act for a lawful, economically integrated joint venture to set the prices at which it sells its products. Although §1 prohibits "[e]very contract [or] combination . . . in restraint of trade," 15 U. S. C. §1, this Court has not taken a literal approach to that language, recognizing, instead, that Congress intended to outlaw only *unreasonable* restraints, *e.g.*, *State Oil Co.* v. *Khan*, 522 U. S. 3, 10. Under rule of reason analysis, antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive. See, *e.g.*, *id.*, at 10–19. *Per se* liability is reserved for "plainly anticompetitive" agree-

*Together with No. 04–811, *Shell Oil Co.* v. *Dagher et al.*, also on certiorari to the same court.

Syllabus

ments. *National Soc. of Professional Engineers* v. *United States*, 435 U. S. 679, 692. While "horizontal" price-fixing agreements between two or more competitors are *per se* unlawful, see, *e.g.*, *Catalano*, *supra*, at 647, this case does not present such an agreement, because Texaco and Shell Oil did not compete with one another in the relevant market—*i.e.*, gasoline sales to western service stations—but instead participated in that market jointly through Equilon. When those who would otherwise be competitors pool their capital and share the risks of loss and opportunities for profit, they are regarded as a single firm competing with other sellers in the market. *Arizona* v. *Maricopa County Medical Soc.*, 457 U. S. 332, 356. As such, Equilon's pricing policy may be price fixing in a literal sense, but it is not price fixing in the antitrust sense. The court below erred in reaching the opposite conclusion under the ancillary restraints doctrine, which governs the validity of restrictions imposed by a legitimate joint venture on nonventure activities. That doctrine has no application here, where the challenged business practice involves the core activity of the joint venture itself—the pricing of the very goods produced and sold by Equilon. Pp. 3–6.

369 F. 3d 1108, reversed.

THOMAS, J., delivered the opinion of the Court, in which all other Members joined, except ALITO, J., who took no part in the consideration or decision of the cases.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 04–805 and 04–814

TEXACO INC., PETITIONER
04–805 *v.*
FOUAD N. DAGHER ET AL.

SHELL OIL COMPANY, PETITIONER
04–814 *v.*
FOUAD N. DAGHER ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February 28, 2006]

JUSTICE THOMAS delivered the opinion of the Court.

From 1998 until 2002, petitioners Texaco Inc. and Shell Oil Co. collaborated in a joint venture, Equilon Enterprises, to refine and sell gasoline in the western United States under the original Texaco and Shell Oil brand names. Respondents, a class of Texaco and Shell Oil service station owners, allege that petitioners engaged in unlawful price fixing when Equilon set a single price for both Texaco and Shell Oil brand gasoline. We granted certiorari to determine whether it is *per se* illegal under §1 of the Sherman Act, 15 U. S. C. §1, for a lawful, economically integrated joint venture to set the prices at which the joint venture sells its products. We conclude that it is not, and accordingly we reverse the contrary judgment of the Court of Appeals.

I

Historically, Texaco and Shell Oil have competed with one another in the national and international oil and gasoline markets. Their business activities include refining crude oil into gasoline, as well as marketing gasoline to downstream purchasers, such as the service stations represented in respondents' class action.

In 1998, Texaco and Shell Oil formed a joint venture, Equilon, to consolidate their operations in the western United States, thereby ending competition between the two companies in the domestic refining and marketing of gasoline. Under the joint venture agreement, Texaco and Shell Oil agreed to pool their resources and share the risks of and profits from Equilon's activities. Equilon's board of directors would comprise representatives of Texaco and Shell Oil, and Equilon gasoline would be sold to downstream purchasers under the original Texaco and Shell Oil brand names. The formation of Equilon was approved by consent decree, subject to certain divestments and other modifications, by the Federal Trade Commission, see *In re Shell Oil Co.*, 125 F. T. C. 769 (1998), as well as by the state attorneys general of California, Hawaii, Oregon, and Washington. Notably, the decrees imposed no restrictions on the pricing of Equilon gasoline.

After the joint venture began to operate, respondents brought suit in district court, alleging that, by unifying gasoline prices under the two brands, petitioners had violated the *per se* rule against price fixing that this Court has long recognized under §1 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, 15 U. S. C. §1. See, *e.g.*, *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U. S. 643, 647 (1980) *(per curiam)*. The District Court awarded summary judgment to Texaco and Shell Oil. It determined that the rule of reason, rather than a *per se* rule or the quick look doctrine, governs respondents' claim, and that, by eschewing rule of reason analysis, respondents had failed to raise

a triable issue of fact. The Ninth Circuit reversed, characterizing petitioners' position as a request for an "exception to the *per se* prohibition on price fixing," and rejecting that request. *Dagher* v. *Saudi Refining, Inc.*, 369 F. 3d 1108, 1116 (2004). We consolidated Texaco's and Shell Oil's separate petitions and granted certiorari to determine the extent to which the *per se* rule against price fixing applies to an important and increasingly popular form of business organization, the joint venture. 545 U. S. ___ (2005).

II

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U. S. C. §1. This Court has not taken a literal approach to this language, however. See, *e.g.*, *State Oil Co.* v. *Khan*, 522 U. S. 3, 10 (1997) ("[T]his Court has long recognized that Congress intended to outlaw only *unreasonable* restraints" (emphasis added)). Instead, this Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful. See, *e.g.*, *id.*, at 10–19 (concluding that vertical price-fixing arrangements are subject to the rule of reason, not *per se* liability). *Per se* liability is reserved for only those agreements that are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." *National Soc. of Professional Engineers* v. *United States*, 435 U. S. 679, 692 (1978). Accordingly, "we have expressed reluctance to adopt *per se* rules . . . 'where the economic impact of certain practices is not immediately obvious.'" *State Oil*, *supra*, at 10 (quoting *FTC* v. *Indiana Federation of Dentists*, 476 U. S. 447, 458–459 (1986)).

Price-fixing agreements between two or more competi-

tors, otherwise known as horizontal price-fixing agreements, fall into the category of arrangements that are *per se* unlawful. See, *e.g.*, *Catalano, supra*, at 647. These cases do not present such an agreement, however, because Texaco and Shell Oil did not compete with one another in the relevant market—namely, the sale of gasoline to service stations in the western United States—but instead participated in that market jointly through their investments in Equilon.[1] In other words, the pricing policy challenged here amounts to little more than price setting by a single entity—albeit within the context of a joint venture—and not a pricing agreement between competing entities with respect to their competing products. Throughout Equilon's existence, Texaco and Shell Oil shared in the profits of Equilon's activities in their role as investors, not competitors. When "persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . such joint ventures [are] regarded as a single firm competing with other sellers in the market." *Arizona* v. *Maricopa County Medical Soc.*, 457 U. S. 332, 356 (1982). As such, though Equilon's pricing policy may be price fixing in a literal sense, it is not price fixing in the antitrust sense. See *Broadcast Music, Inc.* v. *Columbia Broadcasting Sys-*

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[1]We presume for purposes of these cases that Equilon is a lawful joint venture. Its formation has been approved by federal and state regulators, and there is no contention here that it is a sham. As the court below noted: "There is a voluminous record documenting the economic justifications for creating the joint ventures. [T]he defendants concluded that numerous synergies and cost efficiencies would result" by creating Equilon as well as a parallel venture, Motiva Enterprises, in the eastern United States, and "that nationwide there would be up to $800 million in cost savings annually." 369 F. 3d 1108, 1111 (CA9 2004). Had respondents challenged Equilon itself, they would have been required to show that its creation was anticompetitive under the rule of reason. See *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 768 (1984).

tem, Inc., 441 U. S. 1, 9 (1979) ("When two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act").

This conclusion is confirmed by respondents' apparent concession that there would be no *per se* liability had Equilon simply chosen to sell its gasoline under a single brand. See Tr. of Oral Arg. 34. We see no reason to treat Equilon differently just because it chose to sell gasoline under two distinct brands at a single price. As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price. If Equilon's price unification policy is anticompetitive, then respondents should have challenged it pursuant to the rule of reason.[2] But it would be inconsistent with this Court's antitrust precedents to condemn the internal pricing decisions of a legitimate joint venture as *per se* unlawful.[3]

The court below reached the opposite conclusion by invoking the ancillary restraints doctrine. 369 F. 3d, at 1118–1124. That doctrine governs the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, on nonventure activities. See, *e.g.*, *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 113–115

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[2]Respondents have not put forth a rule of reason claim. 369 F. 3d, at 1113. Accordingly, we need not address petitioners' alternative argument that §1 of the Sherman Act is inapplicable to joint ventures.

[3]Respondents alternatively contend that petitioners should be held liable under the quick look doctrine. To be sure, we have applied the quick look doctrine to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability. See *California Dental Assn.* v. *FTC*, 526 U. S. 756, 770 (1999). But for the same reasons that *per se* liability is unwarranted here, we conclude that petitioners cannot be held liable under the quick look doctrine.

(1984); *Citizen Publishing Co.* v. *United States*, 394 U. S. 131, 135–136 (1969). Under the doctrine, courts must determine whether the nonventure restriction is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purposes of the business association, and thus valid. We agree with petitioners that the ancillary restraints doctrine has no application here, where the business practice being challenged involves the core activity of the joint venture itself—namely, the pricing of the very goods produced and sold by Equilon. And even if we were to invoke the doctrine in these cases, Equilon's pricing policy is clearly ancillary to the sale of its own products. Judge Fernandez, dissenting from the ruling of the court below, put it well:

> "In this case, nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products. It decided to price them the same, as any other entity could. What could be more integral to the running of a business than setting a price for its goods and services?" 369 F. 3d, at 1127.

See also *Broadcast Music, supra*, at 23 ("Joint ventures and other cooperative arrangements are . . . not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all").

* * *

Because the pricing decisions of a legitimate joint venture do not fall within the narrow category of activity that is *per se* unlawful under §1 of the Sherman Act, respondents' antitrust claim cannot prevail. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE ALITO took no part in the consideration or decision of these cases.